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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL RAY BABINEAUX, Defendant and Appellant.	C081105 (Super. Ct. No. 12F02670)

Defendant Michael Ray Babineaux appeals following his conviction for multiple offenses related to two robberies. He contends: (1) there was not substantial evidence to support one of his convictions for receiving stolen property; (2) his two felony convictions for receiving stolen property (counts thirteen and fourteen) must be reduced to misdemeanors as there was no evidence the value of the stolen property exceeded $950; (3) the imposition of three one-year enhancements for a single prior prison term enhancement was an unauthorized sentence; and (4) the restitution and parole revocation fines must be reduced from $280 to $240. The People properly concede that the

receiving stolen property convictions must be reduced to misdemeanors and that the restitution and parole revocation fines must be reduced to $240. We will order counts thirteen and fourteen reduced to misdemeanors and order the trial court to correct the restitution and parole revocation fines. The matter is remanded to the trial court for resentencing. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On April 7 and April 15, 2012, defendant and his nephew, Gregory Babineaux, planned and committed robberies of two different liquor stores. The robberies also involved kidnappings and carjackings.

On April 7, 2012 (counts one to five), defendant, Gregory, and Keith Smith met at a motel and gathered bandanas, gloves, and hoodies to wear during the robberies. They went to a liquor store and waited. Thomas Mason drove his car to the liquor store and when he came out, defendant, wearing a black bandana, shoved a gun in his face. When Mason tried to escape, Smith hit him repeatedly in the head with a crowbar. They forced Mason back into his car and drove to Jessey Food and Liquor. They told Mason to go into the store, tell the clerk the store was being robbed, and to get on the ground. Defendant and Smith went into the store armed and took money, the cash register, cigarettes, and a store employee's wallet. Defendant, Gregory, and Keith drove back to the motel and divided the stolen goods.

On April 15, 2012, Garth Pierce was in a parking lot of a bar when defendant knocked on his window and held a gun to his head. Defendant and Gregory put Pierce in the back of the van and blindfolded him. Defendant drove the van to Hollywood Market, where defendant told Pierce to go into the store, announce the store was being robbed, and tell everyone to get on the floor. After Pierce complied, defendant and Gregory went into the store, each armed with a gun and wearing a black bandana. They took cash, cartons of cigarettes, lighters, and condoms. They also took a purse from a customer,

Jessica Araiza. After they left the scene, defendant called Ryan Pearce, a prostitute who worked for him, and had her pick up Gregory.

About 1:45 a.m., sheriff deputies detained Pearce and Gregory in an unrelated traffic stop. Gregory had a loaded magazine clip in his rear pocket, and officers found a nine-millimeter handgun near where he had been standing. A search of Pearce's car revealed a pillowcase with cigarettes, condoms, black bandanas, and gloves. The bandanas and pillowcase were used in the April 15 robbery. Another bandana was found in the front seat area of the car. A DNA profile matching defendant was obtained from the gloves and one of the bandanas. Officers also found items from the purse that had been taken from Jessica Araiza.

About a week later, deputies were looking for Pearce's Chevy Lumina. They saw defendant driving the car, and Pearce was in the passenger seat. The deputies arrested defendant and searched the car. In the trunk of the car, they found cartons of cigarettes, sealed Swisher Sweets cigars in a white pillow case, and a white iPhone. The phone was underneath clothes. The iPhone was stolen on April 11, 2012. Defendant was also in possession of a cell phone registered to Charlie Jones. A search of Jones's residence revealed three loaded revolvers and a variety of ammunition in a bag in a bedroom closet. In an entry closet at Jones's apartment, officers found a black backpack, a Sprint HTC cell phone, a wallet containing both defendant's identification and his wife's, lighters, packs and cartons of various brands of cigarettes, and packs of unopened Swisher Sweets cigars. Officers found additional packs and cartons of cigarettes in the freezer. In addition to defendant's driver's license, in the front pocket of the backpack, there was a receipt for the Chevy Lumina, a Nevada DMV record related to Pearce, and a motel receipt for Pearce. The Sprint HTC cell phone was stolen in March 2012.

Cell phone records between defendant and Pearce's phone show them exchanging messages about her work as his prostitute, including her specific earnings and when and where she was working, her selling cigarettes that defendant provided, money she owed,

and payment of her rent at motels. They also reference selling Swisher Sweets cigars. One message indicates Pearce kept some of her things in the trunk of defendant's car. Other messages between Pearce and defendant indicate he was supposed to help her get condoms. She also requested defendant bring her mail. Messages between defendant and his wife indicate defendant spent time at Jones's apartment, including at one point Gregory having hidden defendant's gun at Jones's, and using cartons of cigarettes as currency. Messages between Jones and defendant also indicate they were engaged in cigarette sales, with defendant providing the cigarettes to Jones.

Defendant was charged with two counts of carjacking, two counts of kidnapping to commit robbery, two counts of kidnapping to commit a carjacking, four counts of second degree robbery, two counts of felon in possession of a firearm, and two counts of possession of stolen property. The information also included firearm enhancement allegations for the carjacking, kidnapping, and robbery counts, and a prior prison term allegation.

A jury found defendant guilty of all charges and found all the firearm allegations true. In bifurcated proceedings, the trial court found the prior prison term allegation true. The trial court sentenced defendant to an aggregate determinate sentence of 40 years four months consecutive to an indeterminate sentence of 14 years to life. The trial court stayed the sentences on a number of counts pursuant to Penal Code[1] section 654. The trial court also imposed restitution and parole revocation fines of $280, a court security fee of $560, and a criminal conviction assessment of $420. The court awarded defendant 1,558 days of presentence custody credit. The trial court also ordered victim restitution.

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[1] Undesignated statutory references are to the Penal Code.

DISCUSSION

I

Sufficiency Of The Evidence On Count Thirteen

Defendant contends there is not substantial evidence to support his conviction on count thirteen for receiving stolen property, specifically the iPhone found in the trunk of Pearce's car. He argues there was not substantial evidence he knew the phone was in the car, and therefore that he had constructive possession of the cell phone.

In assessing a claim of insufficiency of the evidence, the reviewing court's task is to review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence--evidence that is reasonable, credible, and of solid value upon which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. It is the jury, not the appellate court, which must be convinced of a defendant's guilt beyond a reasonable doubt. If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 [61 L.Ed.2d 560, 572-574]; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) An appellate court must accept logical inferences that the jury might have drawn from circumstantial evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396.) Before the judgment of the trial court can be set aside for insufficiency of the evidence, "it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the jury." (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429; see *People v. Conners* (2008) 168 Cal.App.4th 443, 453.)

A conviction for receiving stolen property requires that: (1) the property was stolen; (2) the defendant knew the property was stolen; and (3) the defendant received,

concealed, or withheld the property. (*People v. Grant* (2003) 113 Cal.App.4th 579, 596; see § 496.) Possession of the stolen property may be actual or constructive and need not be exclusive. (*People v. Land* (1994) 30 Cal.App.4th 220, 223.) "Physical possession is also not a requirement. It is sufficient if the defendant acquires a measure of control or dominion over the stolen property." (*Id*. at p. 224.) Constructive possession occurs when the defendant maintains control or a right to control the property; possession may be imputed when the property is found in a place that is immediately and exclusively accessible to the defendant and subject to his or her dominion and control, or to the joint dominion and control of the defendant and another. (*People v. Rushing* (1989) 209 Cal.App.3d 618, 621-622; *People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1417.) "To establish constructive possession, the prosecution must prove a defendant knowingly exercised a right to control the prohibited item, either directly or through another person." (*Sifuentes*, at p. 1417.)

Possession may be established through circumstantial evidence and resulting reasonable inferences. "However, . . . mere presence near the stolen property, or access to the location where the stolen property is found is not sufficient evidence of possession, standing alone, to sustain a conviction for receiving stolen property." (*People v. Land*, *supra*, 30 Cal.App.4th at p. 224; see also *People v. Zyduck* (1969) 270 Cal.App.2d 334, 336.) "Something more must be shown to support inferring of [dominion and control]. Of course, the necessary additional circumstances may, in some fact contexts, be rather slight." (*Zyduck*, at p. 336.)

Here, there are sufficient additional circumstances to support the inference that defendant possessed the stolen iPhone. Defendant was the driver of the vehicle in which the phone was found. "Drivers generally have dominion and control over the vehicles that they drive." (*United States v. Lochan* (1st Cir. 1982) 674 F.2d 960, 966.) It was not unreasonable for the jury to impute knowledge of the contents of the vehicle to the driver of the vehicle. (*United States v. Westover* (9th Cir. 1975) 511 F.2d 1154, 1156-1157;

United States v. Ramos (9th Cir. 1973) 476 F.2d 624, 625; *United States v. Dixon* (9th Cir. 1972) 460 F.2d 309; *United States v. Ascolani-Gonzalez* (9th Cir. 1971) 449 F.2d 159; *United States v. Sutton* (9th Cir. 1971) 446 F.2d 916, 917-918.) Moreover, defendant's relationship with Pearce, the owner of the vehicle, was characterized by his exercise of control over her. He was her pimp. She reported her earnings, whereabouts, who she was with, what she was doing, and schedule to him. Pearce sometimes kept her possessions in the trunk of defendant's car. A receipt memorializing the purchase of Pearce's Chevy Lumina was found in a backpack along with defendant's driver's license. And, defendant had previously kept contraband and tools used in his robberies in her car as evidenced when she was stopped with Gregory. Based on the nature of their relationship, the evidence he kept the receipt for the car and kept items associated with robberies in her car, it was not unreasonable for the jury to infer defendant also exercised control over Pearce's car, and the possessions in it, including the iPhone. In addition, just as defendant and Pearce were engaged in criminal activities together, including selling cigarettes, so were defendant and Jones. Defendant stored stolen contraband at Jones's apartment, including cartons of cigarettes and another stolen cell phone. The contents of Pearce's trunk mirrored the contents of Jones's closet: cigarettes, Swishers, and a stolen cell phone. The similarities between the stolen goods maintained in separate locations by defendant's criminal cohorts was another circumstance permitting the jury to reasonably infer that he exercised dominion and control over the car and its contents. The totality of the circumstances in this case, that defendant was the driver of the vehicle, his relationship of control over Pearce, his maintenance of the receipt for the car, and the similarities between contraband found in Jones's closet and Pearce's car are sufficient additional circumstances from which the jury could infer defendant constructively possessed the stolen iPhone.

II

Evidence Of Value Of Stolen Property In Counts Thirteen And Fourteen

Defendant contends his felony convictions for receiving stolen property -- counts thirteen and fourteen -- must be reduced to misdemeanors. He argues there was no evidence that the value of each cell phone exceeded $950 and he does not have any disqualifying convictions; therefore, he is entitled to the benefits of Proposition 47. The People concede this point. We accept the concession.

The offenses charged here occurred in April 2012. The information was filed in August 2012, and there were no allegations as to the value of the cell phones. In November 2014, Proposition 47 went into effect. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) Defendant was convicted and sentenced in October 2015 and January 2016, respectively.

Proposition 47 reclassified certain drug- and theft-related offenses as misdemeanors. Section 1170.18 provides that a defendant currently serving a sentence for a felony that would have been a misdemeanor had Proposition 47 been in effect at the time of the offense may file a petition for recall of sentence and resentencing. (§ 1170.18, subd. (a).)[2] If the defendant is entitled to resentencing, he or she "shall be given credit for time served and shall be subject to parole for one year following completion of his or her sentence, unless the court, in its discretion, as part of its resentencing order, releases the person from parole." (§ 1170.18, subd. (d).)

At the time defendant committed the offenses, the crime of receiving stolen property was punishable as either a misdemeanor or a felony. In the interests of justice, the crime could be charged as a misdemeanor if the value of the stolen property did not

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[2] Effective January 2017, section 1170.18, subdivision (a) was amended to clarify that "[a] person who, on November 5, 2014, was serving a sentence . . . [could] petition for a recall of sentence . . . ."

exceed $950. (Former § 496, subd. (a).) As relevant here, Proposition 47 amended section 496, subdivision (a) to provide that the crime must be charged as a misdemeanor if the value of the stolen property does not exceed $950, and the defendant does not have any disqualifying prior convictions. (§ 496, subd. (a).) If the value of the stolen property exceeds $950, the crime remains punishable as either a misdemeanor or a felony. (*Ibid*.)

For a defendant with no disqualifying prior convictions, when the value of the stolen property does not exceed $950, the defendant "may only be convicted of a misdemeanor." (*People v. Shabazz* (2015) 237 Cal.App.4th 303, 309.) As indicated in *People v. Yearwood* (2013) 213 Cal.App.4th 161 at pages 167 through 168, examining virtually identical statutory language found in Proposition 36, the new rules apply where defendant is convicted and sentenced *after* the effective date of the statute. That is, "[i]f the crime was committed prior to November 5, 2014, but sentenced after that date, the new sentencing rules will apply to the case. This means that all persons charged with qualified crimes [who] have not been convicted or sentenced as of November 5th will be entitled to misdemeanor treatment without the need to request any kind of a resentencing under section 1170.18. The procedures authorized by section 1170.18 clearly apply only to persons either serving a sentence or who have completed a sentence--circumstances not applicable to persons who have not even been sentenced." (Couzens & Bigelow, Proposition 47: The Safe Neighborhoods and Schools Act (May 2017) <http://www.courts.ca.gov/documents/Prop-47-Information.pdf> p. 12 (as of June 8, 2017).) At trial, the People did not present evidence as to the value of the phones. Defendant does not have any disqualifying convictions. He was convicted and sentenced after the effective date of the statute. Accordingly, we will order counts thirteen and fourteen reduced to misdemeanors and remand the matter for resentencing.

III

Sentences For Enhancements

Defendant contends the trial court imposed an unauthorized sentence when it relied on *People v. Williams* (2004) 34 Cal.4th 397 (*Williams*), and imposed three 1-year enhancements for the prior prison term, one for the determinate sentence, and one for each of the indeterminate sentences. He argues because this is not a three strikes case, it should be controlled by *People v. Tassell* (1984) 36 Cal.3d 77, overruled on another ground in *People v. Ewoldt* (1994) 7 Cal.4th 380, 401.

Section 667.5, subdivision (b) requires the trial court to impose an additional, consecutive one-year term for each prior separate prison term for any new felony on which a prison sentence is imposed. The purpose of the statute, like section 667, is to increase prison terms for recidivists. (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1561-1562, citing *Williams*, *supra*, 34 Cal.4th at p. 404; *People v. Fielder* (2004) 114 Cal.App.4th 1221, 1229.)

In *Tassell*, our Supreme Court held that "when imposing a determinate sentence on a recidivist offender convicted of multiple offenses, a trial court is to impose an enhancement for a prior conviction only once to increase the aggregate term, and not separately to increase the principal or subordinate term imposed for each new offense. [Citation.]" (*Williams*, *supra*, 34 Cal.4th at p. 400, italics & fn. omitted.) The court "explained how section 1170.1 affects the imposition of sentence enhancements: 'Section 1170.1 refers to two kinds of enhancements: (1) those which go to the nature of the offender; and (2) those which go to the nature of the offense. Enhancements for prior convictions--authorized by sections 667.5, 667.6, and 12022.1--are of the first sort. The second kind of enhancements--those which arise from the circumstances of the crime--are typified by sections 12022.5 and 12022.7: was a firearm used or was great bodily injury inflicted? Enhancements of the second kind enhance the several counts; those of the first kind, by contrast, have nothing to do with particular counts but, since they are related to

the offender, are added only once as a step in arriving at the aggregate sentence.' [Citations.]" (*Williams*, at p. 402.)

In *Williams*, our Supreme Court was faced with whether *Tassell's* holding applied to multiple indeterminate third strike sentences. (*Williams*, *supra*, 34 Cal.4th at p. 400.) The court concluded *Tassell* was "not controlling . . . in this . . . different context" because *Tassell* relied on section 1170.1, which generally governs the calculation and imposition of a determinate sentence when a defendant has been convicted of more than one felony offense and does not apply to multiple indeterminate sentences imposed under the three strikes law. (*Williams*, at pp. 402-403.) The court noted that "[t]he Three Strikes law, unlike section 1170.1, does not draw any distinction between status enhancements, based on the defendant's record, and enhancements based on the circumstances of the current offenses, and the Three Strikes law generally discloses an intent to use the fact of recidivism to separately increase the sentence imposed for each new offense." (*Williams*, at pp. 404-405.) The court therefore concluded that "under the Three Strikes law, section 667[, subdivision](a) enhancements are to be applied individually to each count of a third strike sentence." (*Williams*, at p. 405.)

In *People v. Misa* (2006) 140 Cal.App.4th 837, the Fourth Appellate District applied an analysis similar to *Williams* to a second strike offender who was not subject to an indeterminate sentence under the three strikes law, but rather subject to an indeterminate sentence because of his torture conviction. (*Misa*, at pp. 846-847.) In *Misa*, the trial court sentenced the defendant to an indeterminate life sentence on the torture count, a determinate term on one assault count, and stayed punishment on the second assault count. Additionally, the trial court imposed separate five-year enhancements under section 667, subdivision (a)(1) on both the torture count and the assault count for the defendant's prior serious felony conviction. (*Misa*, at p. 841.) The court held that "[a]lthough [the defendant] was a second strike defendant rather than a third striker, he is nonetheless a recidivist and . . . is thus subject to a prior conviction

enhancement under section 667, subdivision (a) on the torture count even though he also received a similar enhancement relating to the assault count." (*Misa*, at p. 847.) In so holding, the court reasoned that even though *Williams* dealt with the issue of multiple prior conviction enhancements on a third strike offender, "a logical application of the *Williams* analysis in th[e] context [of a second strike offender with an indeterminate sentence] would require the imposition of the prior conviction enhancement on [the defendant's] second strike offense (the torture count) notwithstanding that the enhancement was also imposed as a status enhancement relating to the determinate term on the assault count." (*Misa*, at p. 846.)

Here, as in *Misa*, defendant was subject to an indeterminate term, not as a result of the three strikes law, but rather as a result of the crime he was convicted of. Accordingly, we find the reasoning of *Williams* and *Misa* applies here. Indeterminate sentences are not governed by section 1170.1. (*Williams, supra*, 34 Cal.4th at p. 402.) Defendant's indeterminate sentences for kidnapping to commit a carjacking (counts three and eight) were properly increased by one year apiece, based on the prior prison term enhancements. Moreover, adding the prior prison term enhancements to both indeterminate sentences is consistent with the purpose underlying section 667.5, which is the same as that of the three strikes law, to "use[] a defendant's status as a recidivist to *separately* increase the punishment for *each* new felony conviction." (*Williams*, at p. 404.) "[F]or the same reasons discussed in *Williams* and *Misa* concerning a section 667, subdivision (a) five-year enhancement, neither section 1170.1 nor any other statute requires a section 667.5, subdivision (b) prior prison term enhancement be applied only once when a defendant receives multiple indeterminate terms." (*People v. Garcia*, *supra*, 167 Cal.App.4th at p. 1562.) While *Williams* and *Misa* addressed only the prior serious felony enhancement, their reasoning applies with equal force to prior prison term enhancements. (*Garcia*, at p. 1561.)

IV

Restitution And Parole Revocation Fines

Defendant contends, and the People properly concede, the restitution and parole revocation fines should be reduced from $280 to $240. Defendant acknowledges trial counsel did not object to the fines and contends this was ineffective assistance of counsel.

Section 1202.4, subdivision (b)(2) states: "In setting a felony restitution fine, the court may determine the amount of the fine as the product of the minimum fine . . . multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted." Here, at sentencing, the trial court stated, "In addition, I need to make the proper restitution orders. I'm going to order a restitution fine in the amount of, let me see, would that be 280 in '12?" The clerk confirmed the amount. The trial court then stated, "So I'm going to give him the minimum restitution fine of $280. I'll stay an additional restitution fine in that same amount pending successful completion of parole if the defendant ever is paroled."

Defendant committed his crimes in April 2012. At the time he committed his crimes, the minimum restitution fine under section 1202.4, subdivision (b) was $240. (Former § 1202.4, Stats. 2011, ch. 358, § 1.) The statute was amended effective January 1, 2013, to provide: "the fine shall not be less than two hundred forty dollars ($240) starting on January 1, 2012, two hundred eighty dollars ($280) starting on January 1, 2013, and three hundred dollars ($300) starting on January 1, 2014, and not more than ten thousand dollars ($10,000)." (§ 1202.4, subd. (b)(1).)

Generally, a sentence is " 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case." (*People v. Scott* (1994) 9 Cal.4th 331, 354.) The $280 restitution fine does not meet this definition, because it was within the statutory limits. Thus, the trial court had the legal authority to impose a fine in that amount. (§ 1202.4, subd. (b); see *People v. Lewis* (2009) 46 Cal.4th 1255, 1321.)

Because the sentence could lawfully be imposed, defendant was required to object in the trial court to preserve the issue for appeal. (*Scott*, at p. 354; *People v. Smith* (2001) 24 Cal.4th 849, 851-852.) In the absence of an objection, defendant has forfeited his claim of error. (*People v. McCullough* (2013) 56 Cal.4th 589, 599.) Anticipating this conclusion, defendant contends trial counsel rendered ineffective assistance of counsel by failing to object to the trial court's use of the incorrect minimum amount to calculate the restitution fine. The People properly concede this issue.

To prevail on an ineffective assistance of counsel claim, defendant must prove two elements: (1) trial counsel's deficient performance; and (2) prejudice as a result of that performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 677-678].) Deficient performance is established if the record demonstrates that counsel's representation "fell below an objective standard of reasonableness under the prevailing norms of practice." (*In re Alvernaz* (1992) 2 Cal.4th 924, 937.) With respect to unfavorable sentencing issues, "a defense attorney who fails to adequately understand the available sentencing alternatives, promote their proper application, or pursue the most advantageous disposition for his client may be found incompetent." (*People v. Scott*, *supra*, 9 Cal.4th at p. 351; see also *People v. Le* (2006) 136 Cal.App.4th 925, 936 [finding ineffective assistance of counsel where counsel failed to object to a fine calculation in which the court added counts where a punishment should have been stayed per § 654].) Further, "[e]ven where deficient performance appears, the conviction must be upheld unless the defendant demonstrates prejudice, i.e., that, ' " 'but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " ' " (*People v. Anderson* (2001) 25 Cal.4th 543, 569.)

Here, both prongs of *Strickland* are satisfied. The record before us indicates the trial court intended to impose the minimum statutory restitution and parole revocation fines, but was mistaken as to the correct statutory minimum. Trial counsel failed to

object to the trial court's mistaken statement of the minimum statutory fine. It is reasonably probable the court would have imposed a smaller restitution fine, and corresponding parole revocation fine, if trial counsel had objected at sentencing. Specifically, the trial court would have imposed a $240 minimum restitution fine, and corresponding parole revocation fine, rather than $280. We therefore conclude that defendant here suffered ineffective assistance of counsel.

DISPOSITION

The convictions for receiving stolen property in counts thirteen and fourteen are reduced to misdemeanors and the matter is remanded for resentencing. The trial court is also directed to correct the restitution fine and corresponding parole revocation fine, utilizing the correct statutory minimum of $240. In all other respects, the judgment is affirmed.

/s/
Robie, Acting P. J.

We concur:

/s/
Mauro, J.

/s/
Renner, J.